SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. [redacted]77

GEORGE D. HORNING, *Petitioner*,

vs.

THE DISTRICT OF COLUMBIA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PETITIONER.

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I.

Statement of the Case.

This is a case on certiorari to the Court of Appeals of the District of Columbia to review the judgment of that Court in affirming the judgment of the Police Court of the District of Columbia.

In the latter Court an information was filed by the District of Columbia (hereinafter called District) against the petitioner (hereinafter called defendant), charging him with violation of the Act of Congress of February 4, 1913 (37 Stats. L., 657), entitled "An Act

to Regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, savings banks, building and loan associations, and real estate brokers in the District of Columbia."

Upon its filing, and before defendant's arraignment thereon, the judge of the Police Court presiding, of his own motion, quashed the information; and the Court of Appeals of the District of Columbia, on writ of error allowed the District, reversed that judgment and remanded the case with instructions to vacate the order quashing the information, and for further proceedings (*District of Columbia* v. *Horning*, 47 App. D. C. 413).

Thereupon, defendant being arraigned pleaded not guilty, and was tried by the Court and a jury, which latter returned a verdict of guilty (Rec., 9), and defendant was sentenced accordingly (Rec., 46).

On the trial the judge presiding was asked, among other things, to instruct the jury respecting the essentiality to the carrying on of his business by defendant of sundry acts appearing from the evidence, but declined so to do, and in effect told the jury that he, the judge, found the facts disclosed by the evidence to be such as the Court of Appeals had held to constitute a violation of the law, concluding with what was admittedly in substance and effect a peremptory instruction to the jury to find the defendant guilty, and an admonition, not to say adjuration, to the jurors that their failure so to find could arise only from a wilful and flagrant disregard of their oaths (Rec., 41, f. 41).

To this instruction defendant duly excepted (Rec., 41, f. 41), and also moved the Court to discharge the jury from further consideration of the case, upon the

ground that the only effect of the action of the Court could be coercion of the jury (Rec., 42).

A writ of error was duly allowed defendant (Rec., 1), and on hearing the same the Court of Appeals (hereinafter called "Court below"), affirmed the judgment of the Police Court (Rec., 53, f. 57).

II.

Assignments of Error.

The Court below erred as follows:

1. In not sustaining each and every of the errors assigned in that Court.

2. In holding that the conduct of defendant's business as disclosed by the evidence constituted the doing by him of business in the District of Columbia.

3. In holding that the Judge of the Police Court of the District of Columbia did not err in instructing the jury to find the defendant guilty.

4. In holding that the Judge of the Police Court did not in effect so instruct the jury.

5. In holding that it was not error for the Judge of the Police Court to overrule defendant's motion to discharge the jury from further consideration of the case upon the ground that by his charge the verdict of the jury was coerced.

6. In not reversing the judgment of the Police Court.

7. In affirming the judgment of the Police Court.

In the Court below the errors assigned were that the Police Court erred as follows:

1-4. In refusing to grant defendant's prayers Nos. 1. 2. 3 and 4, respectively, for instruction to the jury.

5. In refusing to grant defendant's prayer No. 5, directing a verdict for defendant.

6. In instructing the jury as in and by the Court's charge given of its own motion appears.

7-11. In directing the jury in effect peremptorily to find a verdict of guilty.

12. In overruling defendant's motion to discharge the jury from further consideration of the case.

III.

Argument.

As the case was presented to the Court below in accordance with the scheme of the assignment of errors there made, the same will for convenience, as well as for the better elucidation of the action of the Court now sought to be reviewed, be followed herein.

1. As the trial in the Police Court followed the previous consideration of the case by the Court below, and was had in the light of the opinion thereon rendered, it will be helpful in the outset of the argument to give the latter Court's view of the information and of the applicability of the matters thereby charged to the question whether a violation of the Act of Congress therefrom appeared.

The information alleges that defendant maintained in the City of Washington, District of Columbia, a place of business, called "Warehouse. Formerly Loan Office," by posted notice declared to be "exclusively for storage purposes" and for the settlement of loans made prior to the operation of the Act on which the information is based, the notice further an-

nouncing, "no application for loans will be received or considered here, and no examination, appraisement or valuation of pledges will be made here"; that defendant advertised in the newspapers of the city a place of business, for making loans, in the State of Virginia, and "free automobile" thereto from the Washington establishment; and that at the latter there was a branch office of a general messenger service in which defendant had no financial interest except that he hired it space in his place of business.

The substantial charges of the information are thus stated by the Court in its opinion on the earlier writ of error (47 App. D. C. 415-17):

> "It is charged that at divers times prior to the filing of the information, persons applied at the Washington office of defendant to make loans, and exhibited jewelry and other property which they desired to deposit as security therefor; that they were told that the jewelry or property would not be appraised or valued for loan purposes in the District of Columbia, and that no loans upon the security thereof would be made in the District, but that they might either send the articles to defendant's Virginia office by a messenger from the messenger service company, for which service they would have to pay ten cents, or defendant would send them to the Virginia office free of charge in one of his passenger automobiles, a number of which were kept on hand at the Washington office for this purpose; that when articles were sent by messenger a receipt for the articles was given by the messenger service company, and the articles were taken to the Virginia office, where they were appraised and a pawn ticket and the sum of money loaned delivered to the messenger, who returned to the Washington office and delivered

them to the borrower; that when the borrower was transported by automobile the money and pawn ticket were delivered to him at the Virginia office, and he was returned by the automobile either to the Washington office or to any other point in the District to which he desired to be taken, and that when the borrower desired to pay the loan he presented his money and pawn ticket at the Washington office, where he was directed either to send them by messenger to the Virginia office, or take them himself by one of defendant's automobiles, where a warehouse receipt or redemption ticket was given either to the messenger to deliver to the borrower or to the borrower direct, as the case might be, which receipt was presented by the borrower at the Washington office, where he received his property.

"It is sought by the information to charge a violation of the provisions of the Act of Congress of February 4, 1913 (37 Stats. L., 657), entitled 'An Act to regulate the business of loaning money on security of any kind by persons, firms, and corporations other than national banks, licensed bankers, trust companies, saving banks, building and loan associations and real estate brokers in the District of Columbia.' It provides, among other things, 'That hereafter it shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license.' The Act then provides that licensees may charge not exceeding 'one per centum per month on the actual amount of the loan, and this charge shall cover all fees, expenses, demands, and services of every character, including notarial and recording fees and charges, except upon the fore-

closure of the security.' In the present case, defendant in error is charged with conducting a loan business in the District of Columbia without a license and with charging a greater rate of interest than six per cent, to wit, three per cent per month, for each month or fraction thereof."

Having before it only the information, its allegations and charges, the Court, after disposing of questions not now involved, dealt with the sufficiency of the information as follows (47 App. D. C. 421-3):

"Coming to the sufficiency of the information to charge an offense under the statute, it will be observed that the act in question declared it unlawful 'to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, without first obtaining a license to do so. Defendant had not taken out a license under the act. He is charged with doing business without a license, and with charging interest rates prohibited by the act even if he had taken out a license. The gravemen of the offense here charged is engaging in the business of loaning money in the District of Columbia in a manner prohibited by law. It is conceded that, if done in the District, the acts came within the prohibition of the statute; but it is argued that the information fails to charge that defendant engaged in the business of loaning money upon security in the District of Columbia.

"The business of a pawn broker, as conducted by defendant through his combined District and Virginia offices, consists of a number of elements: (1) a place where applications for loans are made; (2) the application for the loan; (3) the disclosure

of the security; (4) the appraisement of the security; (5) the agreement for the loan and for its repayment; (6) the payment of the money to the borrower and the delivery of the pledge to the broker; (7) the safe-keeping by the pledgee of the property pledged; (8) the payment of the loan, with agreed interest, and, (9) the return of the pledge. It will be observed that of the elements entering into the transaction five of the nine (1, 2, 3, 7 and 9) were performed in the Washington office.

"It appears from the record that defendant conducted a licensed pawn brokers' business at his Washington office prior to the passage of the statute here in question; that he then obtained a license in Virginia and established an office just across the Potomac River at the 'south end of Highway Bridge'; that he continued to advertise his Washington office in connection with the conducting of his loan business; that he established free automobile service for those who applied for loans at the Washington office to transport them to and from the Virginia office; that all that was done at the Virginia office was to appraise the security, deliver the money loaned and to accept repayment of the loan; that the property pawned was brought back by defendant from the Virginia office and kept in the Washington office, and that, when the loan was paid off at the Virginia office, a receipt was given the borrower and he was directed to present it at the Washington office, where the property pledged would be delivered to him. From the foregoing, it may be said that the business of a pawn broker was not exclusively carried on either in the Washington or Virginia office, since it took the transactions at both offices to completely enable defendant to engage in the business.

"This is not a contract, the enforcement of

which is dependent upon the law of the jurisdiction in which it is to be performed, nor is it a proceeding for the enforcement of a contract. It is a criminal action to punish the doing of an unlawful business in this District. We are not, therefore, concerned with the validity or invalidity of defendant's contracts in the State of Virginia. Citation of authority respecting the jurisdiction of courts to enforce contracts made in one State to be performed in another have no analogy. The law denounces the business; and when it appears that one is engaged in transactions which come, in whole or in part, within the prohibition of the statute, he will be held to be doing business within the purview of the act. We are not dealing with a contract which is against public policy, but with a business conducted in such manner as to make it unlawful and against public policy.

"Laws of this sort are enacted for the protection of the public, and courts look with disfavor upon attempts, by circumvention or subterfuge, to escape their restrictions. True, a lawful act may not be condemned merely because the person doing it had a bad motive, but where the unlawfulness of the act is at issue, and the actor selects an unusual method for the express purpose of evading the law, the means employed become quite material in characterizing the transaction. Cook vs. Marshall County, 196 U. S., 261. Considering, therefore, the whole transaction, it amounts, in our opinion, to nothing less than an attempt to continue the pawn brokerage business at the original Washington office unfettered by the restrictions of a local license. The branch office conducted under color of a Virginia license at the 'south end of Highway Bridge,' with its transportation facilities, either by private automobile

service furnished by defendant or the dime messenger service, or otherwise, is a mere agency of the local or main concern. Through this device defendant seeks to escape the penalties of the law and continue to conduct an unlawful business in this District. The Virginia branch was opened for this purpose, not through a desire to establish a legitimate business in that State, but to enable defendant to conduct a prohibited business here.

"The statute here is not aimed at the prohibition of a well-defined act which is in itself criminal, but at the regulation of a business, which if conducted in a manner prohibited by the statute, is declared to be against public policy, and which subjects the person engaging therein to the penalties prescribed in the act. The conducting of a business consists of many elements and many separate acts, and when it appears that any of the acts essential to the complete transaction of the business have been carried on within the jurisdiction where the doing of business is prohibited, the transgressor will be held to come within the limitations of the act. The rule of strict construction as applied to criminal statutes is relaxed in the interpretation of an act designed to declare and enforce a principle of public policy. We must keep in mind the purpose of the legislation and the evils sought to be prohibited, and, if possible, give force and effect to the legislative intent. United States vs. Corbett, 215 U. S., 233; District of Columbia vs. Dewalt, 31 App. D. C., 326, 36 Wash. Law Rep., 396; United States vs. Cella, *supra.*"

2. As is seen, as respects the violation of the Act in question, (which, as it is accurately said, "is not aimed at the prohibition of a well-defined act which is in itself criminal, but at the regulation of a busi-

ness," the gist of the opinion is that, as "the conducting of a business consists of many elements and many separate acts, and when it appears that any of the acts essential to the complete transaction of the business have been carried on within the jurisdiction where the doing of business is prohibited, the transgressor will be held to come within the limitations of the Act,") the central and controlling question accordingly is whether any of the acts appearing from the evidence to have been done by defendant in the District of Columbia was so essential to the transaction of his business as to bring him within the law relied upon.

It is in this understanding of the Court's first opinion that the first four errors were assigned below.

In dealing with these it was not overlooked that in this opinion the Court had enumerated nine elements as entering into "the business of a pawnbroker, as conducted by defendant through his combined District and Virginia offices," of which nine it is said that five were performed in the Washington office, namely, those numbered (1), (2), (3), (7) and (9).

The nine elements thus enumerated are as follows:

(1) A place where applications for loans are made.

(2) The application for the loan.

(3) The disclosure of the security.

(4) The appraisement of the security.

(5) The agreement for the loan and for its repayment.

(6) The payment of the money to the borrower and the delivery of the pledge to the broker.

(7) The safe-keeping by the pledgee of the property pledged.

(8) The payment of the loan, with agreed interest.
(9) The return of the pledge.

Of course, in stating the five of these elements which it mentions as being performed in the Washington office, the Court in its opinion meant that the allegations of the information so stated, and nothing more, for the Court when then speaking had before it the information only and no evidence whatever; and, obviously, upon the trial it became a question of fact as to each of these elements whether the same was or was not performed in that office.

Dealing with the evidence, and stating it as strongly as possible against defendant, what was done respecting the first three, namely, those numbered (1), (2) and (3), was this: an intending borrower went to defendant's Washington office to apply for a loan, having with him, and exhibiting, the security intended to be offered therefor. Upon stating his mission, he was told that no application for a loan could be made there, that no security offered would be appraised, and, in fact, no comment would be made thereon in respect of its sufficiency, but that the intending borrower might secure a loan at the Virginia office, which he might reach by one of defendant's automobiles without charge, or by any other means of transportation of his own choosing, or to which he might send his application and security by messenger.

Very clearly, did the matter stop here, there would be no case of an application received or security considered by defendant in the District of Columbia, and there would have been no loan of money either within or without the District; and in order to a loan, it was necessary for the intending borrower, as of his own initiative, either personally or by messenger to make

his application and present his security at the only place where either would be considered by defendant, namely, the Virginia office.

Equally clearly, did the defendant or his representative at the Virginia office not regard the security offered as sufficient, the matter would stop there, and there would yet be no loan.

In legal contemplation, the substance and effect of this may be accurately stated thus: the intending borrower, not being invited there for that purpose, went to the Washington office and expressed his wish to make a loan; being told that he could there do nothing in connection with the transaction, he was informed that he might make the transaction at another establishment of defendant in another jurisdiction, the means of reaching which for the purpose were indicated to him; he had the option of dropping the matter there or of taking it up in the other jurisdiction; and having decided upon the latter course, the transaction was there had or not, according as the security offered was deemed sufficient or not—in other words, according as defendant there determined whether to have the transaction or not. And it is not unimportant to note that no advertisement by defendant of his business indicated his Washington office as a place to be visited for the purpose of any application for a loan; that defendant's advertisements were only of business to be transacted at his Virginia office; that the signs in and about his Washington office definitely and specifically gave notice that no application would be received or considered there, and no examination, appraisement or valuation of pledges would be made there; and that the only tender of service by defendant was of his free automobiles in which his intending

customers might be carried to and brought back from the Virginia office.

In the light of this and of the evidence given at the trial, it is an unavoidable conclusion that any attempt at application for a loan at the Washington office was wholly without defendant's invitation in that behalf, wholly on the initiative of the intending borrower, and wholly without any reasonable or proper expectation on his part that the same would be received. Surely argument is not expected to the proposition that, in such a state of case, defendant can in no sense and to no extent be charged with having in the District of Columbia a place where applications would be received or were even invited. Having no evidence before it, and being guided solely by the information, the Court, in its opinion, might well speak of the Washington office as "a place where applications for loans are made," but it is not believed that the Court could properly do so in the light of the actual facts as disclosed by the evidence.

And in this immediate connection it is pertinent to note the following language of the Court in its opinion, following the citation of a case in this Court (47 App. D. C. 422-3):

> "Considering, therefore, the whole transaction, it amounts, in our opinion, to nothing less than an attempt to continue the pawn brokerage business at the original Washington office unfettered by the restrictions of a local license. The branch office conducted under color of a Virginia license at the 'south end of Highway Bridge,' with its transportation facilities, either by private automobile service furnished by defendant or the dime messenger service, or otherwise, is a mere agency

of the local or main concern. Through this device defendant seeks to escape the penalties of the law and continue to conduct an unlawful business in this District. The Virginia branch was opened for this purpose, not through a desire to establish a legitimate business in that State, but to enable defendant to conduct a prohibited business here."

Again it is in order to note that this language was used in the light of the information only, and upon its allegations.

In the case in this Court, cited in the opinion immediately preceding this quotation therefrom, this Court said:

"While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet, where the lawfulness or unlawfulness of the act is made an issue, the intent of the actor may have a material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So, where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportion, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for protection of the people, it is pertinent to inquire whether the act was not done for that purpose."

Cook vs. Marshall Co., 796 U. S. 261, 271-2.

And also said this Court, in the same case:

> "Undoubtedly a law may sometimes be successfully and legally avoided if not evaded." *Id.*, 273.

And obviously so: avoidance, as distinguished from evasion, of a given law may be in perfect good faith and effective; as where one facing the possible application to himself of two laws puts himself in a position to escape the operation of one and to subject himself to the operation of the other. In such case the former law is successfully avoided and the latter made applicable and operative, but no one would seriously contend that under the circumstances the former law would be applied to the case. The law of a given jurisdiction cannot have extra-territorial operation, and one in good faith taking himself out of a jurisdiction into a territory where the law cannot operate upon him does not evade the law, he simply gets beyond the field of its operation, in a word, he avoids the law; and for purposes of enforcement a law avoided is no law.

Very clearly, therefore, the question whether acts charged upon a defendant constitute an intentional but unsuccessful endeavor to avoid the operation of a law, or even to evade it, turns not only upon the acts done by the defendant but also and especially upon his intention in the premises.

And, while upon consideration of the information and its allegations alone, the language of the Court below just quoted may have been justified, it is deferentially but confidently submitted that it can not be in the light of the testimony of defendant herein, which was the only testimony upon the point given in the case, as follows: anticipating that the Act upon which the in-

formation is based would become a law, and before it was signed, defendant sought the advice of counsel about moving his entire business to Virginia and conducting it under a Virginia license; he went to Virginia, bought a lot and contracted for a building and office; and after the enactment of the Act, namely, in April, 1913, he opened his place in Virginia. He was advised that he could do business in Virginia, and as respects the pledges that he had a property therein in bailment, that he had a right to store them in any place he chose so long as he was in a position to deliver them back to their owners, and that he selected Washington as his storehouse because he had an office there well equipped for taking care of the pledges. (Rec., 34, ff. 33-4.)

This leads naturally to a consideration of the remaining two, namely, those numbered (7) and (9), of the five elements said by the Court below to enter into the transaction of defendant's business, and as being performed in the Washington office.

Of these, that numbered (7) is "the safe keeping by the pledgee of the property pledged," and that numbered (9) is "the return of the pledge."

Passing for the moment the question whether as matter of either fact or law either of these elements enters into the transaction of defendant's business, in the sense in which that business is affected or liable to be by the Act of Congress under consideration, the relation in law of defendant to pledges taken by him as security for loans made by him is so clearly defined and so accurately described in a work of accepted authority, and the numerous cases cited in support of its text, as to call for but brief citation therefrom, and therefrom only.

"In the case of a valid pledge the pledgee acquires a lien on the thing pledged, to the extent of the indebtedness secured, which is usually held to continue as long as he retains possession thereof, either actual or symbolic, and the debt which it was pledged to secure remains unpaid." 21 R. C. L., 651-2.

"For the purpose for which it was pledged the right of the pledgee to the pledge is exclusive and yields to no other right which did not attach upon it in the shape of a lien, prior pledge, or some claim existing prior to the pledge, and good at law." *Id.*, 652.

"The pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods until the debt has been paid or the pledgee's lien otherwise discharged, and until then the pledgee has the whole present interest. * * * Whatever special interest or estate in the pledge is necessary to enable the pledgee to exercise the rights guaranteed to him, or to discharge the obligations imposed on him by the contract, will vest in him. He is entitled to maintain any action for the protection of his possession and special rights of property, not only against third persons who wrongfully interfere with the same but also against the pledgor if he wrongfully obtains or retains possession. * * * A pledgor who takes the property from the possession of the pledgee with the fraudulent intent and felonious design of depriving the latter of such possession and of his security may be convicted of larceny." *Id.*, 663-4.

And as respects the question of the *bona fides* of defendant in transferring, or undertaking to transfer,

his business to Virginia, not to evade the law but to avoid its application to him by going to a jurisdiction where it was not in force, this obviously turns upon his intention in doing what he did, and this, as always, in such cases, presents a question of fact.

> "The state of a man's mind at a given time is as much a fact as is the state of his digestion. Intention is a fact."
>
> Swift vs. Rounds, 19 R. I., 527; 33 L. R. A., 561, 563.

And this of necessity makes the question involved one for the jury and not for the Court.

The title of the Act under consideration is, "An Act to regulate the business of loaning money on security," etc., and it provides, among other things, that "it shall be unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind * * * without procuring a license."

It will be noted not only that the Act aims at the regulation not of pawnbrokers as such but the business of loaning money on security, however carried on, but also that neither the word "pawn" nor the word "pawnbroker" appears in the Act. It is accordingly immaterial in what manner the business may be carried on: the material inquiry is whether one sought to be brought within the provisions of the Act is engaged in the business undertaken to be regulated.

And what is meant by engaging in a business is clearly settled: it does not denote a single act or transaction, but the aggregation of acts or transactions pertaining to, and in fact constituting, such business; it is continuous in its character, and is synonymous with employment or occupation, signifying that which occupies the time, attention and labor of a man for the purpose of gaining a livelihood or profit.

Hoagland vs. Segar, 38 N. J. L., 230, 237.
D. &. H. Canal Co. vs. Mahlenbrock, 63 N. J. L., 281.
Sterne vs. State, 21 Ala., 43, 46.
Martin vs. State, 59 Ala., 34, 36.

Accordingly the Act does not apply to a single act of lending money on security at whatever rate of interest; nor does it apply to the engaging in the business of lending money on security at a rate of interest not higher than six per centum per annum; nor does it apply to the engaging in the business of lending money without security at a higher rate of interest than six per centum per annum: it applies only to the engaging, in whatever manner, in the business of lending money on security at a higher rate of interest than six per centum per annum without a license so to do; and the gravamen of the offense created by the statute is, accordingly, engaging in the last-mentioned business, and such only.

In order to determine whether, and if so, where, one is engaged in such business, the initial inquiry is what constitutes a lending of money on security.

It is conceived to be not subject to argument that lending money consists in the passing of it by the

lender to the borrower, that when this is accomplished the transaction is completed, and that unless it be accomplished there is no lending of money. And where the lending is to be on security, there can be no such transaction without the passing of the security from the borrower to the lender, and when this is done, and not until it is done, the transaction of lending money on security is accomplished.

And if it be conceded that the initiative in the transaction is with the borrower, the relation of the lender to the transaction does not and can not begin until the doing by him of some act indicating a willingness and readiness to make the transaction: just as an offer does not make a contract and if not accepted by the one to whom made is as though it had never been made. Also an invitation by advertisement or otherwise by one at a given place to the public to transact business with such one at another place is not an act of the business at the place of invitation, seeing that the invitation by its very terms is to have the transaction at the other place indicated; and it can not seriously be contended that when invited to transact business at another place than the place of invitation the one invited can constitute the one extending the invitation as transacting business at the place of invitation in the face of a refusal by the latter so to do, or even to consider the so doing.

Again, when the transaction of loan on security is completed by the passing of the money from lender to borrower, and the passing of the security from borrower to lender, it is completed—nothing more, nothing less than this can be said or contended; and when the security—in law a pledge—gets into possession of the

lender, it is his, to the extent above shown, and his only obligation to the lender in respect thereof is to take care of it and to return it when the loan is paid; and the only relation of the borrower to it is that, while he may dispose of his interest in it to another, he can do so only subject to the payment of the loan, until which time both the right and the obligation of the lender remain unaffected. Apart, therefore, from the borrower's right to have the pledge back when the loan is paid, it is no concern of his how or where the lender may keep it; it is kept, in contemplation of law, as much for the lender as for the borrower. Nor is there any obligation on the lender to keep the pledge in any particular manner, or at any particular place, and neither the manner nor the place of keeping the pledge has any relation whatever to the business of lending the money secured by it.

Accordingly, if the lender has a more secure place for keeping the pledge than the place at which the transaction of lending the money upon it was had, his election there to keep the pledge, and the fact of his there keeping it, can not by any proper reasoning be referred to his lending upon it. Very few pawnbrokers have places for storing and keeping pledges apart from the places at which they make loans; one has but to traverse the streets of any city wherein pawnbrokers do business to realize this as a fact. And should even a pawnbroker elect to take the risk of keeping pledges left with him about his person or in his dwelling, such fact has, and can possibly have, no bearing upon the transaction of loan. And assuming a pawnbroker doing business on the Virginia side of the city of Bristol and having a warehouse for the storing of his pledges on the Tennessee side of the city, would or could it be

contended that any part of the transaction of lending on a pledge took place in Tennessee?

It irrefutably follows that of the nine "elements" assumed by the Court below to be included in "the business of a pawnbroker" (ante, pp. 7-8, 11-12), but two, namely those numbered (5) and (6), are actually comprised within the transaction of lending money on security—that is to say, the only transaction regulated by the Act under consideration; and, both on the hypothesis of the Court below and in the light of the concededly uncontradictory and uncontradicted evidence, each of these was exclusively performed at defendant's Virginia establishment only.

With these views in mind, the first four errors assigned in the Court below, relating to instructions refused by the Police Court, may now be considered.

(1) The first of these instructions is as follows:

> "You are instructed that to constitute an application to the defendant for a loan within the meaning of the information, it is not sufficient for the applicant merely to communicate his desire or request in that behalf to the defendant, but it is necessary further for the defendant to entertain the expression of such desire or request with a view to acting favorably upon the same, in accordance with the proposal of the applicant, and that the mere expression of the desire or request of the applicant and the declination of the defendant so to entertain the same would not constitute an application as aforesaid, within the meaning of the information." (Rec., 38.)

Had this instruction been given, as clearly it should have been, there might, and there probably would, have

been removed from the case any possibility of the finding by the jury that defendant did in the District of Columbia any act in the way of receiving, much less entertaining, any application for a loan, and as corollary thereto there would similarly have been removed any possibility of the jury's finding that he received or considered in the District of Columbia any security in connection with such an application. And there would thus have been eliminated from the case the possibility of the jury's finding to have been transacted in the District of Columbia any one of the first three of the five elements above enumerated as entering into the transaction of business by defendant in the District of Columbia.

(2) The remaining three of the four instructions under immediate consideration are as follows:

> "You are instructed that upon receiving from any person a pledge as security for a loan to such person by the defendant, the latter immediately became vested by law with a special property in such pledge as against all the world, including such person himself, until his redemption of the said pledge by repayment of the loan made thereon, and, further, that the defendant became to such person an insurer of the safety of the said pledge, and its due return upon repayment of the loan, and accordingly that it was the right of the defendant, during the continuance of the loan and until its repayment, to keep the said pledge, wheresoever and in such depository as in his judgment proper; and without regard to the locality of such depository." (Rec., 38.)

> "If you find from the evidence that in making use of his Washington premises as a warehouse

or place of storage for his pledges given him the defendant so did for the purpose of safely keeping the said pledges for his own protection against their possible loss, and to the end that he might have them for redelivery to his customers on the repayment by them of their loans, and for no other purpose, you are instructed that such use of the said premises did not constitute the carrying on by the defendant of the business of a pawnbroker or any essential incident thereto." (*Ibid.*)

"If you find from the evidence that in making use of his Washington premises as a warehouse or place of storage for pledges given him the defendant so did for the purpose of safely keeping the said pledges for his own protection against their possible loss, and to the end that he might have them for redelivery to his customers on the repayment by them of their loans, and for no other purpose, you are instructed that such use of the said premises did not constitute the carrying on by the defendant of lending money in the District of Columbia, or any essential incident thereto." (Rec., 39.)

Had these instructions been given, as also clearly they should have been, they in turn might, and probably would, have removed from the case the possibility of the finding by the jury that defendant's manner of keeping and returning pledges received by him involved any act essential to, or indeed constituting part of, the doing by him, whether in the District of Columbia or elsewhere, of the business of lending money on security; and so, also, the seventh and ninth of the elements enumerated as entering into the business of a pawnbroker, or of lending money on security by de-

fendant, in the District of Columbia would have passed from the case.

All and every of the instructions to which the errors under consideration relate involve the intention—in other words, the good faith—of defendant in the acts specified, and this—the intention or good faith of defendant—could not be determined by the mere specification of the acts, but only by ascertainment of the mind of defendant in doing them, matter exclusively within the province of the jury; wherefore, although in its earlier opinion the Court below might, as it clearly did, have suspected—nay, predetermined—the good faith of defendant in the premises, the jury alone could properly decide the question, and it accordingly was palpable error in the Police Court in instructing the jury to assume, as it did, that the suspicion or predetermination of the Court below, on the mere specification of the acts, and in the absence of evidence, was conclusive of the matter, and forestalled and canceled the right and duty of the jury to determine for itself the question of defendant's good faith in the light of the evidence.

Wherefore, had the four instructions considered been given, there would have remained in the case of the nine elements enumerated only those indicated by the Court below as not to have been transacted in the District of Columbia, and, indeed, the only elements entering into and constituting the lending of money on security within the meaning of that expression as above shown; and a verdict of not guilty must inevitably have followed.

3. The fifth assignment of error in the Court below was based upon the refusal of the Police Court to instruct the jury that upon the whole evidence in the case its verdict should be not guilty.

This instruction was asked on the assumption that the preceding four would be granted, as the only evidence in the case bearing upon the facts, on the hypothesis of which the preceding four instructions were prayed, was directly and exclusively in support of that hypothesis. Wherefore, the granting by the Police Court of the preceding four instructions might, and probably would, as above indicated, have removed the possibility of the jury's finding to have been performed in the District of Columbia any of the aforementioned elements, namely, those numbered (1), (2), (3), (7) and (9), mentioned by the Court below as appearing from the information there to have been performed; and the necessary result of this would have been a verdict of acquittal.

4. Of the remaining assignments of error below, those numbered from six to eleven, inclusive, were based upon the Police Court's peremptorily, in effect, directing the jury to find a verdict of guilty.

That these assignments were well made conclusively and abundantly appears from the most casual reading of the Court's charge to the jury, both in the first instance and after the jury had been recalled to the court room on the morning of the day following its retirement to consider of its verdict.

A few extracts from the charge sufficiently characterize it.

Thus said the Court:

> "There is no contradiction here in the testimony of these witnesses as to the acts and transactions engaged in and had in the management of

this business that was conducted, whether it was conducted here or in Virginia." (Rec., 40, f. 40.)

"As to what constitutes an engaging in business, that is not a question for you gentlemen to determine in this case, because you are instructed that if these witnesses told the truth about the matter that was an engaging in business in the District of Columbia, within the meaning of the law." (*Ibid.*)

"If you believe the testimony of these witnesses who have recited these facts to you here, it is your duty, then, under these instructions, to bring in a verdict of guilty in this case." (Rec., 40, f. 40.)

"There is really no issue of fact for you to decide." (Rec., 41, f. 41.)

"In a criminal case the Court can not peremptorily instruct the jury to find the defendant guilty. If the law permitted I would do so in this case.

"In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. * * *

"Of course, gentlemen of the jury, I can not tell you, in so many words, to find the defendant guilty, but what I say amounts to that. The facts proved before you are in accord with the information. The Court of Appeals has said that that constitutes a violation of the law; and that is all there is in the case." (Rec., 41, f. 41.)

The Court below itself, in a well considered case, was supposed to have precluded argument of the point that this constitutes palpable, and indeed fla-

grant, error; palpable, because of the language of that Court, and flagrant, because the error was persisted in over the citation of its previously rendered opinion.

In the case referred to, the Court below, in stating the case, said:

> "There is no conflict as to the facts. The details of the transaction, as proven, are admitted by defendants. * * * The chief complaint relates to the charge of the Court."

The language of the trial Court so complained of, and for which error was assigned, was as follows:

> " 'Ordinarily, I tell a jury that they must find beyond a reasonable doubt; but here the evidence is practically beyond any dispute. Almost all of it, the facts as to almost all of these matters are stated by the defendants themselves in substantially the same way as stated by the other witnesses, and the counsel have not cared to argue the question as to whether the facts I have referred to are established beyond a reasonable doubt, in view of the law as held by the Court. So that you will probably have no difficulty upon that branch of the case. I can not, in a criminal case, order a verdict. In a civil case, the Court may direct a verdict, but in all criminal cases the jury are bound to return the verdict themselves, but are called upon to take the law from the Court, because in that way the rights of the parties can be preserved. So, my instruction is that the law is such, upon the undisputed evidence in the case, that you ought to render a verdict of "guilty"

upon the counts I have submitted to you, and of "not guilty" upon the other counts.' "

And the error assigned was thus dealt with:

"*Of course, it is beyond the power of a Court to instruct a jury to return a verdict of guilty in a criminal case, either directly or indirectly by the use of language which amounts to the direction of a verdict.* The Constitution of the United States guarantees every person charged with crime the right of trial by jury. Art. III, sec. 2, cl. 3, 6th Amendment. This right can not be taken away by the legislative department of the Government, much less by the judicial. *It would be a judicial frittering away of the citizens' constitutional rights to hold that the charge of the Court in this case did not amount to a direction to return a verdict of guilty.* Juries are composed of men of average intelligence, who have to depend upon the Court for guidance in the performance of their duties. Every word that falls from the lips of the trial judge is accepted, and under all ordinary circumstances acted upon, by the jury. *In this instance, what the Court did amounted to taking from the jury all questions of fact, and charging them that, under the law, it was their duty to find the defendant guilty.* In Breese vs. United States, 48 C. C. A., 36, 108 Fed., 804, a case very similar to the one at bar, the trial judge, after expressing the opinion in the charge that the defendant was guilty, and that it was the duty of the jury to so find, charged the jury at great length that his opinion was not theirs, and that they were the sole judges of the facts, and should determine the guilt or innocence of the defendant independently of any opinion expressed by him. The Court of Appeals, reversing the case, said: 'But, inasmuch

as the strong opinion expressed by the judge below in his charge to the jury, in which he used the words, "that, in his opinion, it was the duty of the jury to convict the defendant," was calculated to mislead the jury, who perhaps construed this language as a direction on the part of the Court, we think it would be proper to grant a new trial.'

"*The instruction in the present case constitutes reversible error.* It is not a case of the Court summing up an issue of fact, and charging the jury that if they find certain facts to be true, they should find the accused guilty; and then summing up the facts upon the other side, and charging that, if they should find those facts to be true, they should acquit the accused. *No question of fact was here submitted to the jury. The court stated that no issue of fact existed, and applying the law to the facts thus found by the Court to be established, declared that the defendants were guilty, and instructed the jury that it ought so to find. Indeed, the instruction was so explicit that the jury would have been justified in regarding it as a direct violation of the mandate of the Court had it returned a verdict of not guilty.* The trial judge 'should take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. * * * It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling'. Starr vs. United States, 153 U. S., 614, 625, 626, 38 L. ed., 814, 845, 846, 14 Sup. Ct. Rep. 919."

Masters vs. United States., 42 App. D. C., 350, 353-5.

On the hearing below it was deemed sufficient to quote without comment the observation of the Police Court upon this opinion, when overruling the motion for a new trial, as follows:

> "When you read the Masters case you will see that they reversed the conviction in that case upon the ground that there was some evidence which raised an issue of fact. The question came up in that case as to the admissibility of evidence as to the intent with which the defendant acted. The Appellate Court decided that the trial court erred in not admitting that testimony. *In that state of the case, for the purpose of the opinion, the record stood as if that testimony had been admitted,* and with that testimony in, there certainly was evidence there as to whether or not the man had committed an offense. *That opinion, and the language used in it, is based upon that fact.*" (Rec., 43-4, f. 43.)

But the confidence of counsel in the premises proved to be misplaced, for in its opinion affirming the judgment of the Police Court herein the Court below spoke thus of its holding in the Masters case (Rec., 51, f. 53):

> "We held in that case that error was committed *in refusing to admit certain testimony,* which, if admitted, would have presented a sharp issue of fact for the jury."

It would perhaps be lacking in deference to say that nothing could be further from accuracy.

The opinion in the Masters case is perfectly clear, perfectly simple. Says the Court therein, "The *instruction* in the present case"—not any *refusal to admit testimony*—"constitutes reversible error;" and

then the Court, quite superfluously, if charitably, adds (42 App. D. C. 355):

> "The Court fell into this error in interpreting the statute to mean that the mere conversion of the funds constituted a wrongful conversion, and therefore the question of criminal intent was not an element of the crime to be proven as in a common law felony."

And this the Court, after discussion of the relation of intent to the offense under consideration, followed by remarking (42 App. D. C. 357):

> "It was error, therefore, for the Court to refuse to permit counsel for defendants to argue the question of criminal intent to the jury, and thereby withdraw from the consideration of the jury the evidence offered to establish the good reputation of defendants for honesty and integrity. Such evidence is always admissible in a criminal trial upon the question of intent."

Too obviously for discussion, what the Court "held in that case" is that

> "it is beyond the power of a Court to instruct a jury to return a verdict of guilty in a criminal case either directly or indirectly by the use of language which amounts to the direction of a verdict,"

and however the trial Court came to violate this principle is wholly unimportant:

The decision is, that even in a case in which the Court so limits the evidence as to preclude a controversy of fact, the principle may not be violated.

And out of the respective utterances of the Police Court and the Court below on the opinion in the Masters case very clearly arises the question, which of the two Courts more plainly misconceived and more pointedly misstated the matter actually considered and decided? but this question it is not conceived to be the duty of counsel to consider, much less to decide.

That the Police Court plainly violated the rights of defendant in the particular under consideration is clear from the quotations from that Court above appearing (*Ante*, pp. 27-8).

And that in affirming the judgment herein the Court below not only equally clearly violated those rights but also misinterpreted the charge in question, is abundantly evident from the conclusion of its opinion, as follows (Rec., 52-3, ff. 54-6):

> "*There was no lawful power vested in the jury to acquit defendant.* In convicting him, no right of his was violated, since he had no right to an acquittal. The right of trial by jury guaranteed by the Constitution is the right to a lawful trial where the jury is governed in its deliberations by the law as given by the court. Every general verdict is compounded both of law and fact—the law as given by the court, and the facts as adduced from the witness stand. The jury has the physical power to disregard both, but not the moral right. In the absence of any issue of fact, as here, only a question of law remains; and while the jury has the arbitrary power to disregard it, one failing to profit by such a disregard of duty is not in position to complain.
>
> "The right guaranteed the citizen is to be tried according to the fixed law of the land, and not according to the mere guess of a jury in the exer-

cise of purely arbitrary power. If denied the former, he has suffered an injury from which the law will grant relief; if granted the latter, he is the recipient of a gross miscarriage of justice; but, if denied it, he has been deprived of no legal or constitutional right of which he may be heard to complain.

"The court in charging the jury that a failure to return a verdict of guilty could be due only to 'a wilful and flagrant disregard of the evidence and the law * * *, and a violation of their obligation as jurors,' stated the truth, *and at the same time the law of this case.* It is clear that, unless the jury violated their obligations as pointed out by the court, they could not acquit the defendant. *The jury, however, was not divested of the freedom to exercise arbitrary power. On the contrary, it was expressly told that it possessed that power.* Hence, in order that we may reverse the case, it must appear not only that the jury was not permitted to exercise arbitrary power and 'disregard the evidence and the principles of law applicable to the case,' or that some other right of defendant has been infringed. The record fails to disclose either. *It is not apparent, therefore, that any error prejudicial to defendant was committed.*"

Horning v. District of Columbia., 48 App. D. C. 380, 386-7.

Nor was the allusion by the Police Court and the Court below to the case of Sparf v. United States conspicuously felicitous.

In that case Sparf and another were jointly indicted for murder and tried together. On the trial the admission in evidence of a declaration in the nature of a con

fession made by his codefendant was complained of by Sparf and assigned in his behalf as error. And the trial court instructed the jury in effect that the defendants should, if convicted, be found guilty of murder only and not of a less offense, upon the ground that there was no evidence upon which any verdict could be properly returned, except one of guilty or one of not guilty of the particular offense charged.

Both defendants were found guilty of murder and sentenced to be hanged, and the judgment was reversed as to Sparf because of the erroneous admission of his codefendant's confession, but sustained as to his codefendant upon the ground that it was not error in the trial court to take from the jury consideration of a less offense.

The decision was by a divided court, and the chief question discussed in the two principal opinions—that of Mr. Justice Harlan, speaking for the Court, and that of Mr. Justice Gray, speaking for himself and Mr. Justice Shiras in dissent—was whether in a criminal case a jury is the judge of both law and fact or must take the law as given it by the Court; in other words, whether a Court has the right to control a jury even in matter of law. The decision was that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. In the course of two opinions mentioned, the whole subject is very fully discussed and each opinion will repay careful and repeated perusal. That of Mr. Justice Harlan is illustrative of his well-known thoroughness and patience, and that of Mr. Justice Gray, covering approximately seventy-three pages, may fairly be characterized as conspicuously one of the

ablest of dissenting opinions to be found in the reports of this Court.

But while the Court was divided in opinion as to affirming or reversing the judgment against Sparf, there was no division of opinion upon the question under immediate consideration.

This is made clear beyond all room for doubt by the following extracts from the respective opinions mentioned.

From the opinion of the Court:

> "We have said that with few exceptions, the rules which obtain in civil cases in relation to the authority of the Court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense charged or of any criminal offense less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in United States v. Taylor, 3 McCrary, 500, 505. It was there said: 'In a civil case, the Court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the Court; but in a criminal case, if the verdict is one of acquittal, the Court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the Court's view of the law, would be set aside. The same result is accomplished by

an instruction given in advance to find a verdict in accordance with the Court's opinion of the law. But not so in criminal cases. A verdict of acquittal can not be set aside; and therefore, if the Court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly' " (pp. 105-6).

From the dissenting opinion of Mr. Justice Gray:

"In civil cases, doubtless, since the power to grant new trials has become established, the Court having the right to grant one to either party as often as the verdict appears to be contrary to the law, or to the evidence, may, in order to avoid unnecessary delay, whenever in its opinion the evidence will warrant a verdict for one party only, order a verdict accordingly. Pleasants v. Fant, 89 U. S., 22 Wall., 116; Hendrick v. Lindsay, 93 U. S., 143; Schofield v. Chicago, M. & St. P. R. Co., 114 U. S., 615.

"But a person accused of crime has a twofold protection, in the Court and the jury, against being unlawfully convicted. If the evidence appears to the Court to be insufficient in law to warrant a conviction, the Court may direct an acquittal. Smith v. United States, 151 U. S., 50. But the Court can never order the jury to convict; for no one can be found guilty, but by the judgment of his peers" (p. 174).

"This is not a case in which the judge simply declined to give any instructions upon a question of law which he thought did not arise upon the evidence. But, after giving sufficient definitions, both of murder and of manslaughter, he peremptorily told them that they could not convict the defendants of manslaughter only, and thereby denied the right of the jury to pass upon a matter

of fact necessairly included in the issue presented by the general plea of not guilty.

"This appears to us to be inconsistent with settled principles of law, and with well considered authorities" (p. 177).

"For the twofold reason that the defendants, by the instructions given by the Court to the jury, have been deprived, both of their right to have the jury decide the law involved in the general issue, and also of their right to have the jury decide every matter of fact involved in that issue, we are of opinion that the judgment should be reversed, and the case remanded with directions to order a new trial as to both defendants" (pp. 182-3).

Sparf v. United States, 156 U. S., 51.

For the error alone thus appearing the judgment of the Court below should be reversed.

5. It remains only to consider the assignment of error based upon the refusal to grant defendant's motion to discharge the jury from further consideration of the case, upon the ground that the effect of the Police Court's action pointed to by the assignment was to coerce the jury to render a verdict of guilty. (Rec., 41-2.)

The same considerations which demand the conclusion that the error last above treated is plain and reversible lead to the same conclusion respecting this assignment, and the same may, therefore, safely be submitted without further comment.

Respectfully submitted,

HENRY E. DAVIS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 924.

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT OF THE CASE.

George D. Horning was convicted in the police court of the District of Columbia of a misdemeanor, for engaging, in said District, in the business of loaning money on security upon a rate of interest greater than 6 per cent per annum, in violation of the Act of February 4, 1913 (37 Stat. L., 657), and was sentenced to pay a fine of $50.

The record discloses that an information was filed against Horning, charging this offense in great detail, which information was quashed by the judge of the police court, upon the ground that, as matter of law, the facts therein set forth did not constitute an offense under the Act aforesaid.

On writ of error allowed to the District of Columbia, the Court of Appeals examined the information, held that the facts charged therein did constitute a violation of said Act of Congress, and remanded the case to the police court for further proceedings.

Thereafter the case came on for trial, and defendant therein demanded a trial by jury, and from a verdict of guilty and judgment thereon was allowed a writ of error to the Court of Appeals, which affirmed the judgment and sentence aforesaid. His petition to this Honorable Court for a writ of certiorari to the Court of Appeals of the District of Columbia to review its action upon the second writ of error was granted, and the case is now here for review of the charge of the trial judge.

ARGUMENT.

Counsel for petitioner complains:

1. That the verdict of the jury in the police court was coerced.

2. That error was committed in refusing certain instructions prayed on behalf of defendant in the police court, which, if granted, would have presented issues of fact.

Concerning the first error alleged, the opinion of the Court of appeals disposes thereof, adversely to the contentions of petitioner, in such a thorough and convincing manner that it would be presumptuous on the part of counsel for the District of Columbia to attempt any addition to or improvement upon the argument contained in the opinion itself. The opinion makes it perfectly clear that petitioner complains to this court, not that he did not receive a *fair* trial by an *impartial* jury in the police court, but because he did not receive an *unfair* trial, by a *partial* jury, acquitting him of an offense the commission of which he admitted when testifying as a witness in his own behalf.

Petitioner possesses the unique distinction of having entered a formal plea of not guilty of the offense charged against him, demanded a jury trial, and then taken the witness stand and testified to the commission by him of every act charged against him in the information, and determined by the Court of Appeals to constitute, as matter of law, the offense charged. A parallel case would be for a defendant, charged with assault with a dangerous weapon, to plead not guilty, and then testify that he deliberately shot at the prosecuting witness, with a revolver, without any provocation or extenuating circumstances; and, nevertheless, ask a verdict of acquittal and then complain if the jurors performed their plain duty, and brought in a verdict of guilty.

An examination of the record in this case, and particularly of the testimony of petitioner himself and of the witnesses called on his behalf, removes every possibility of doubt as to his guilt, and demonstrates beyond question that he is not complaining of a miscarriage of justice, but because one did not take place for his benefit.

Counsel for petitioner states in his brief that no one of the five elements of petitioner's business was admitted by his testimony to have been carried on in the District of Columbia.

The five elements referred to are set forth in the opinion of the Court of Appeals upon the first appeal to that court in this case, reported in 47 App. D. C., 413, in the following language:

> "The business of a pawnbroker, as conducted by defendant through his combined District and Virginia offices, consists of a number of elements: (1) a place where applications for loans are made; (2) the application for the loan; (3) the disclosure of the security; (4) the appraisement of the security; (5) the agreement for the loan and for its repayment; (6) the payment of the money to the borrower and the delivery of the pledge to the broker; (7) the safekeeping by the pledgee of the property pledged; (8) the payment of the loan, with agreed interest, and,

(9) the return of the pledge. It will be observed that of the elements entering into the transaction five of the nine (1, 2, 3, 7 and 9) were performed in the Washington office."

That the Court of Appeals accurately stated the facts concerning the transaction, in the District of Columbia, of the elements referred to, appears from the record of the testimony introduced on behalf of the defendant, as follows:

1. A Place Where Applications for Loans are Made.

Defendant's witness Leatherman testified, on cross-examination, that he was in defendant's employ from February 1st to July 13th, 1917; that during that period persons would come to defendant's place of business at 9th and D streets northwest, and say that they desired to secure loans on articles of personal property; that he would tell them that no loans were made in the District, and no appraisements, but that they could go to defendant's office in Virginia, from the 9th and D Street office, in one of defendant's automobiles, free of charge, or could utilize the Dime Messenger Service to send over their pledges, or to send over their pawn tickets for the purpose of redeeming pledges; that there were always two cars, and sometimes three, utilized for this purpose, and witness would call in the chauffeur and tell him to make the trip. When borrowers wanted to redeem their loans—many of them, probably seventy-five to one hundred per day, came in during the period above mentioned—the witness would tell them that pledges could not be redeemed in Washington, but that this would have to be done in Virginia, and that if they desired they could go to the Virginia office in one of defendant's automobiles, or could utilize the Dime Messenger Service, which was there at their disposal; numbers of them would go over in the free automobile service and numbers would utilize the Dime Messenger boys. That was the manner of conducting the business during the

period above mentioned. Among the people who came there during this period of time some were the same coming in time after time, regular customers (R., 28-30).

Defendant's witness Columbus testified, on cross-examination, that there was telephonic communication between defendant's Virginia and Washington offices, and that the telephone was frequently used between said offices in matters concerning defendant's business (R., 33).

Defendant himself testified, on cross-examination, that from February 1st to July 13th, 1917, he was familiar with the operations of the Washington office; that during this period he received in Virginia from the Washington office, through the Dime Messenger Service, from fifty to seventy-five applications per day.

2. The Application for the Loan.

The witness Leatherman also testified that applications for loans were made at defendant's place of business at 9th and D streets northwest (R., 29), and that among the people who came there during the period inquired about were some persons who came in time after time, regular customers. To the same effect is the testimony of the defendant already cited.

3. The Disclosure of the Security.

That the articles desired to be pledged were exhibited at the defendant's Washington office appears from the testimony of his witness Leatherman, and defendant himself testified to his familiarity with the method of conducting his business, as already stated.

7. The Safe-keeping by the Pledgee of the Property Pledged.

That petitioner maintained his Washington office as a place in which to store pledges was testified to by Leatherman

(R., 27-28) and by defendant, who stated that he "selected Washington as his storehouse because he had an office there that is well equipped for taking care of those pledges (R., 34).

9. The Return of the Pledge.

Leatherman also testified that articles stored in the Washington warehouse were delivered only by warehouse receipts coming from defendant's Virginia office; that upon presentation of the warehouse receipts to witness he delivered the articles called for and filed away the original redemption tickets (R., 28-29). Petitioner's witness Columbus also testified that "the borrower gets the article itself at the warehouse at 9th and D, unless he requests it to be sent to Virginia and delivered over there * * *." Defendant also testified to the redemption and delivery of pledges at his Washington office and to the use of the latter office as a warehouse for pledges (R., 34).

The above references to the testimony are limited to the evidence offered on behalf of petitioner, which was in exact accord with that introduced by the District of Columbia; and concerning these vital matters there was, as stated in the opinion of the Court of Appeals, no conflict whatever in the testimony and nothing for the jury to determine.

The Court of Appeals said, "Defendant, by his testimony, admitted the facts as completely as he could have done by a plea of guilty," and then pertinently inquires, "How far may a defendant rely upon the exercise of arbitrary power by a jury and complain if the jury disappoints his expectations?"

As to the second contention advanced by petitioner, that the refusal of his instructions deprived him of the benefit of issues of fact which would have been presented to the jury by such instructions:

The Court of Appeals had considered all of the facts involved in the charge against petitioner, which were set out

in detail in the information reviewed by that court upon the first writ of error, and which were identically the same facts proved before the jury, and admitted by petitioner.

What he really sought by the instructions requested, was to have the jury reach a different conclusion as to his guilt from that which the Court of Appeals had declared would follow the proof of the facts alleged in the information, and, in effect, to have the jury review and overrule the Court of Appeals upon matters of law.

He now complains because, although he testified to the commission of every act which the Court of Appeals declared to constitute the offense with which he was charged, the jury was not permitted to consider whether these acts did constitute a violation of the law, in spite of the opinion of the Court of Appeals that they did.

The statement of such a proposition contains its own refutation.

We confidently submit that no cause has been shown sufficient to reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

F. H. STEPHENS,
P. H. MARSHALL,
Attorneys for Respondent.